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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 INTERNATIONAL CHURCH OF THE
14 FOURSQUARE GOSPEL,

15 Plaintiff,

16 v.
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18 CITY OF SAN LEANDRO, a municipal
corporation,

19 Defendant.
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23 FAITH FELLOWSHIP FOURSQUARE
CHURCH,

24 Real Party in Interest.
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Case No. C07-03605-PJH

CITY OF SAN LEANDRO'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY ADJUDICATION ON
DEFENDANT'S AFFIRMATIVE
DEFENSES
(Plaintiff's Motion No. 1)

Hearing:

Date: October 1, 2008

Time: 9:00 a.m.

Courtroom: 3

Honorable Phyllis J. Hamilton
Complaint Filed: 7/12/07

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1 I. *INTRODUCTION*

2 In this motion, plaintiff International Church of the Foursquare Gospel ("ICFG")
 3 and "real party in interest" Faith Fellowship Foursquare Church (collectively "the
 4 Church") seek summary adjudication on each of the seventeen (17) affirmative defenses
 5 listed in the City's Answer to Plaintiff's First Amended Complaint for Violation of
 6 Constitutional Rights and the Religious Land Use and Institutionalized Persons Act ("First
 7 Amended Complaint" or "FAC").¹

8 Defendant City of San Leandro ("the City") agrees that certain affirmative defenses
 9 have been rendered moot or superfluous by events occurring since the filing of the First
 10 Amended Complaint, or are untenable in light of currently known facts including the
 11 Eighth, Tenth and Sixteenth Affirmative Defenses. However, in all other instances, the
 12 motion is without merit. Various affirmative defenses are legally tenable, relevant to
 13 claims currently advanced by the Church, and supported by the facts of the case. The
 14 Church's contentions that there are no triable material issues concerning these defenses are
 15 either frivolous in light of the evidence, or based on an erroneous understanding of the
 16 applicable law. These affirmative defenses include:

- 17 • First (failure to state a claim upon which relief can be granted);
- 18 • Fourth (lack of causation for damages);
- 19 • Fifth (failure to avoid or mitigate foreseeable damages);
- 20 • Twelfth (constitutional limitations on relief requested);
- 21 • Thirteenth (unconstitutional application or interpretation of RLUIPA); and
- 22 • Seventeenth (capacity of Faith Fellowship Foursquare Church to sue as "real
 23 party in interest").

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 25
 26 ¹ The Church has now filed two separate motions for summary judgment which are all set
 27 to be heard on October 1, 2008, in violation of this Honorable Court's Pre-Trial
 28 Instructions which requires leave of court to file more than a single motion. Pre-Trial
 Instructions, Section A.2. The City suggests that the Court should strike the second
 improperly filed motion and leave this first filed motion on calendar.

1 The motion should be denied as to each of these affirmative defenses for reasons stated
2 below.

3 The City agrees that the remaining affirmative defenses are basically anticipatory in
4 nature, and not germane to claims *currently* raised in the litigation. It does not follow,
5 however, that summary adjudication of these defenses should be granted. As discussed
6 below, even as the Church is pursuing this motion, it has also sought relief in its
7 accompanying motion for summary judgment on the merits based on factual and legal
8 claims that are not raised in its First Amended Complaint. Unless and until the extent of
9 the issues and legal theories the Church will attempt to assert at or before trial is known, it
10 is premature to grant summary adjudication of the City's anticipatory defenses. The
11 anticipatory affirmative defenses at issue are the Second, Third, Sixth, Seventh, Ninth,
12 Eleventh, Fourteenth and Fifteenth Affirmative Defenses.

13 In opposing this motion, the City relies in part on declarations, exhibits and
14 memoranda of points and authorities submitted by the parties in support of their respective
15 pending cross-motions for summary judgment. For the Court's convenience these
16 materials are submitted concurrently. The materials specifically relied on are:

17 (1) Defendant City of San Leandro's Motion for Summary Judgment or in the
18 Alternative Summary Adjudication of Claims and accompanying memorandum of points
19 and authorities (Exhibit 39, Document 126, filed 8/27/08, "City's MSJ").

20 (2) Declaration of Debbie Pollart In Support of City's Motion for Summary
21 Judgment (Exhibit 38, Document 128, filed 8/27/08, "Pollart Declaration").

22 (3) Defendant City of San Leandro's Exhibits 29, 30, 36 and 37 filed in Support
23 of City's Motion for Summary Judgment and refiled herewith.

24 (4) Declaration of Senior Pastor Gary Mortara in Support of Motion for
25 Summary Judgment and accompanying Exhibit 1 (Exhibit 40, manually filed 8/26/08;
26 "Gary Mortara Declaration").

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1 II. *ABANDONED DEFENSES (8th, 10th, and 16th)*

2 The City agrees that events, discovery or further research conducted since filing of
3 the Answer have demonstrated pursuit of the following affirmative defenses are either
4 unnecessary or untenable.

5 • *Eighth Affirmative Defense – Estoppel.* Discovery has disclosed no facts
6 supporting this defense, and the City does not anticipate that it would be raised as a
7 defense to any possible new claims at trial.

8 • *Tenth Affirmative Defense – Unclean Hands.* Discovery has disclosed no
9 substantial information supporting this defense, and the City does not anticipate that such
10 information will be discovered before trial or would be applicable to any new claims raised
11 by the Church.

12 • *Sixteenth Affirmative Defense – ICFG Capacity to Sue.* Although the
13 relationship of plaintiff ICFG to the actions of the local Church was murky in the early
14 stages of this action, the materials provided by the Church demonstrate that ICFG is a
15 proper party with capacity to sue in this action. It now appears that the party lacking
16 capacity to sue is “real party in interest” Faith Fellowship Foursquare Church, which is
17 simply a subdivision of the ICFG with no apparent right to sue in its own name.

18 III. *CURRENT DEFENSES IN PLAY (1st, 4th, 5th, 12th, 13th and 17th)*

19 If the case proceeds to trial, the City anticipates that the First, Fourth, Fifth,
20 Twelfth, Thirteenth and Seventeenth Affirmative Defenses will be applied to one or more
21 of the Church’s current claims. As discussed below, the Church has failed to establish that
22 there are no triable material issues with respect to these defenses.

23 A. *First Affirmative Defense – Failure to State a Claim.*

24 The Church rather remarkably contends that it is entitled to summary adjudication
25 of this affirmative defense based on a three short paragraphs of conclusory argument to the
26 effect that it *has* stated viable legal claims in its First Amended Complaint. As the pending
27 cross-motions for summary judgment attest, the viability of the Church’s legal claims is, to
28 say the least, in dispute. Rather than reiterate the legal basis for rejection of the Church’s

1 claims here wholesale, the City incorporates the discussion from the City's memorandum
2 in support of its motion for summary judgment here. *See*, Exhibit 39, Document 126;
3 City's MSJ, pp. 679-703.

4 As noted in the Church's memorandum, this defense goes essentially to the
5 sufficiency of the Church's pleadings. However, the deficiencies in the Church's various
6 legal claims do not result merely from failures of proof, but from inherent deficiencies in
7 the legal theories and alleged supporting facts advanced in the First Amended Complaint
8 itself. Although the First Affirmative Defense may be rendered moot in light of the
9 Court's disposition of the pending motions from summary judgment, it certainly cannot be
10 dismissed by way of summary adjudication based on the argument offered here by the
11 Church.

12 B. *Fourth and Fifth Affirmative Defenses – Causation and Mitigation of*
13 *Damages.*

14 The gist of the City's Fourth and Fifth Affirmative Defenses is that the Church
15 improvidently purchased the Catalina Street property which is the focus of the Church's
16 claims *before* the City ever acted on its rezoning requests, and long before the Church had
17 any reasonable expectation that the zoning of the property would be changed to allow
18 religious assembly use. As a result, the Church cannot show a causal connection between
19 most or all of the damages claimed. The City did not in any manner encourage (much less
20 force) the Church to make non-refundable deposits, enter into a purchase contract, delete
21 entitlement approval contingences, or ultimately purchase the Catalina Street Property
22 before any decision had been made by the City about rezoning for Church use. Moreover,
23 the City's actions have not deprived the Church of the ability to use, lease or sell the
24 property for purposes allowed by the current zoning. The only costs the Church has
25 incurred are those inherent in the acquisition of real estate for speculative purposes.

26 These same facts also support the defense of mitigation of damages or, as the
27 doctrine is also known, the defense of avoidable consequences. *Federal Insurance Co. v.*
28 *Sabine Towing & Transportation Co.*, 783 F.2d 347, 350 (2nd Cir. 1986); *Smith v. Rowe*,

1 761 F.2d 360, 366-367 (7th Cir. 1985). The gist of the doctrine is that “fair compensation
 2 to an injured plaintiff do[es] not include wounds which in a practical sense are self
 3 inflicted.” *Federal Insurance*, 783 F.2d at 350, quoting *Ellerman Lines, Ltd v. The*
 4 *Steamship President Harding*, 288 F.2d 288, 290 (2nd Cir. 1961).

5 The critical facts underlying these affirmative defenses are not in dispute. They are
 6 admitted in the Church’s own pleadings. On March 24, 2006 the Church entered into a
 7 purchase agreement and paid a non-refundable deposit of \$50,000, knowing that the property
 8 was not zoned to allow church use. FAC, ¶¶ 15, 16. The Church subsequently extended the
 9 purchase agreement and paid additional deposits although the City had taken no formal
 10 action on its pending rezoning application. FAC, ¶¶ 22, 30. Then, on December 29, 2006
 11 the Church closed escrow on the property, months before any Planning Commission or City
 12 Council action on the proposed Assembly Use Overlay zoning amendments that would allow
 13 religious (and other) assembly uses on some industrial properties. FAC ¶¶ 33, 36, 37. The
 14 Church’s conduct is even more reckless when viewed in light of facts outside the complaint,
 15 e.g. the fact that the church deleted the contingency just four days after it signed the purchase
 16 agreement without any City input or assurance of zoning change approval. Exhibit 38,
 17 Pollart Decl., ¶¶ 15, 18 and Exhibits 36 and 37. The Church at no time was advised by the
 18 City to commit funds to purchase the property prior to obtaining a rezoning. The opposite
 19 was actually the case. Exhibit 38, Pollart Decl., ¶ 18; Exhibit 28 [Jermanis Deposition], pp.
 20 520:15-521:15; Exhibit 30 [Gary Mortara Deposition], pp. 539:3-540:4, 542:17-24.

21 In this motion, the Church does not seriously dispute the facts underlying these
 22 affirmative defenses. Rather, the Church apparently contends (without setting forth
 23 specific supporting facts) that it is entitled to judgment as a matter of law because the
 24 City’s actions imposed a “substantial burden” on the Church. As evidenced in the parties’
 25 pending cross-motions for summary judgment, this issue is hotly debated, with the relevant
 26 facts and evidence overwhelmingly supporting the City. More to the point, however, the
 27 argument simply misapprehends the nature of these defenses. They do not go directly to
 28 the issue of liability, but rather to the amount of damages that may be recovered if liability

1 is found. *Federal Insurance*, 783 F.2d 347, 350. The Church cites no authority suggesting
 2 that the doctrines of causation or the duties to mitigate or avoid damages are inapplicable
 3 in actions brought under RLUIPA. A showing of actual and proximate causation is, of
 4 course, essential to any claim for damages. The defense of avoidance or mitigation of
 5 damages has been found applicable in civil rights cases, as well as in cases where the
 6 plaintiff claimed an exemption from the doctrine for conduct that was alleged motivated by
 7 religious belief. *See, e.g., Smith*, 761 F.2d at 366-367 [civil rights claims]; *Munn v.*
 8 *Southern Health Plan, Inc.*, 719 F.Supp. 525, 529-530 (N.D. Miss. 1989) [reasonable
 9 efforts to mitigate damages not excused where plaintiff claimed available mitigation
 10 measures were contrary to her religious beliefs].

11 As an afterthought, the Church also cites Texas law for the proposition that the duty
 12 to mitigate comes into play only if damages could have been reduced or avoided “with
 13 only slight expense and reasonable effort.” Pl. Memorandum at pp. 13:26 – 14:1, citing
 14 *City of San Antonio v. Guidry*, 801 S.W.2d 142, 151 (Tex. App. 1990). The test under
 15 federal law, however, is simply one of overall reasonableness. *Federal Insurance*, 783
 16 F.2d 347, 350; *Smith v. Rowe*, 761 F.2d 360, 366-367. In any event, the Church’s “slight
 17 expense” argument hardly defeats the City’s affirmative defenses. All the Church had to
 18 do in this case was apply common sense and not incur any expense at all towards purchase
 19 of the Catalina Street property before the site was actually zoned to allow religious
 20 assembly uses. This simple step would have required a moment of practical thinking.

21 C. *Twelfth and Thirteenth Affirmative Defenses – Constitutional Limitations of*
 22 *RLUIPA and on Relief Granted by the Court.*

23 The City’s Twelfth and Thirteenth Affirmative Defenses are based on constitutional
 24 limitations governing the relief that the Court may grant in this action. The Twelfth Cause
 25 of Action is anticipatory in a sense in that it is specifically asserted against a possible
 26 demand by the Church that the City be ordered to issue a conditional use permit (“CUP”)
 27 for a religious assembly use. The Thirteenth Affirmative Defense is asserted against any
 28 possible unconstitutional application or interpretation of RLUIPA. The Church correctly

1 recognizes in its moving papers that the principal limitation is that imposed by the
 2 Establishment Clause of the Fourteenth Amendment. However, the Twelfth Affirmative
 3 Defense also includes limitations imposed by the separation of powers doctrine.

4 The Church's principal argument on these affirmative defenses is simply that
 5 RLUIPA has been upheld against facial attacks based on the Establishment Clause and
 6 other constitutional limitations. This is true, but beside the point. The fact that a statute is
 7 facially valid does not mean that every possible *application* of the statute is valid, or that
 8 every possible *interpretation* of the statute is constitutionally permissible. The City's
 9 Twelfth and Thirteenth Affirmative Defenses are offered expressly against the contingency
 10 that the Church requests, or the Court contemplates granting, relief that exceeds the proper
 11 bounds of legal authority. Other Courts have not only specifically recognized but *warned*
 12 against the potential for such unconstitutional interpretations or applications – or more
 13 precisely *misapplications* – of RLUIPA. *See, e.g. Westchester Day School. v. Village of*
 14 *Mamaroneck*, 386 F.3d 183, 189-190 (2nd Cir. 2004) ["As a legislative accommodation of
 15 religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause
 16 ... and the Establishment Clause ¶ In our view, if RLUIPA means what the district
 17 court believes it does, a serious question arises whether it goes beyond the proper function
 18 of protecting the free exercise of religion into the constitutionally impermissible zone of
 19 entwining government with religion in a manner that prefers religion over irreligion and
 20 confers special benefits on it."]; *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v.*
 21 *Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006) ["The bottom line ... is that
 22 RLUIPA's Equal Terms provision requires equal treatment, not special treatment."];
 23 *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) ["Were
 24 we to adopt the synagogues' reasoning [M]unicipalities ... would run the risk of
 25 impermissibly favoring religion over other secular institutions, or of favoring some
 26 religious faiths over others."]; *Civil Liberties for Urban Believers v. City of Chicago*, 342
 27 F.3d 752, 762 (7th Cir. 2003) ("*C.L.U.B.*") ["Otherwise, compliance with RLUIPA would
 28 require municipal governments not merely to treat religious land uses on an equal footing

1 with nonreligious land uses, but rather to favor them in the form of an outright exemption
2 from land use regulations. Unfortunately for Appellants, no such free pass for religious
3 land uses masquerades among the legitimate protections RLUIPA affords to religious
4 exercise.”].

5 Those courts who have addressed the facial constitutionality of RLUIPA, moreover,
6 have made it clear that it is constitutional only if interpreted to adhere to the limitations
7 imposed by the Establishment Clause. *See, e.g. Midrash*, 366 F.3d at 1241 [“RLUIPA
8 does not impose affirmative duties on states that would require them to facilitate or
9 subsidize the exercise of religion.”].

10 Given the inherent tension between Establishment Clause and the Free Exercise
11 Clause that RLUIPA is intended to implement, it is hardly unreasonable to anticipate by
12 way of affirmative defense a demand for relief under RLUIPA that exceeds proper
13 constitutional constraints. *Westchester Day School*, 386 F.3d at 189-190. In this case, the
14 defense is not merely anticipatory. The demands made by Church clearly exceed anything
15 that could be justified in the name of accommodation of religion. The Church has
16 essentially asked the Court to order the City to disregard legitimate and objective zoning
17 criteria and rezone a particular piece of industrial land for the Church’s use because the
18 Church deems that particular property ideal for its purposes and conveniently available at a
19 suitable price. Neither RLUIPA or the Free Exercise Clause of the First Amendment,
20 however, bestow upon churches the right to obtain rezonings of industrial property on
21 demand. Clearly the Church is not being asked to be placed on a mere “equal footing”
22 with non-religious land uses, but is asking for extraordinary special treatment simply
23 because it is a religious institution. *C.L.U.B.*, 342 F.3d at 762; *Primera Iglesia*, 450 F.3d
24 at 1313.

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D. *Seventeenth Affirmative Defense – Capacity to Sue of Faith Fellowship Foursquare Church.*

The City's Seventeenth Affirmative Defense challenges the capacity of the Faith Fellowship Foursquare Church to sue as a "real party in interest." The Church's argument on this point is a strange one. Aside from contending that the Court may not inquire into the legal status of the local church under the First Amendment, the Church contends the defense is "factually meritless because ICFG and the Church are parts of the same entity." Pl. Memorandum, p. 23:20-21. If this is so – which appears to be the case in light of evidence submitted in support of the Church's motion – then the local church has no separate capacity to sue at all in its own name. The point may, of course, be moot. It does not presently appear likely that the outcome of the case will depend upon whether the local church has a separate capacity to sue. Nevertheless, the defense is technically valid given the facts admitted by the Church, and cannot be resolved in favor of the Church by summary adjudication.

IV. *ANTICIPATORY DEFENSES (2nd, 3rd, 6th, 7th, 9th, 11th, 14th and 15th)*

The City agrees that the affirmative defenses discussed below are *at present* inapplicable to the claims actually pled in the Church's First Amended Complaint and actually being pursued by the Church in this litigation. These affirmative defenses were advanced in anticipation of possible additional claims or arguments that might be asserted by the Church based on discovery of new information, on events occurring after the filing of the First Amended Complaint, or based on new or changed legal theories purportedly (but not actually) presented in the First Amended Complaint.

The Church contends that summary adjudication is proper on these defenses because the Church would be required to amend its current complaint to assert any new legal claims or theories which might trigger these defenses. The problem with this argument – and the disingenuousness of the Church's argument – is demonstrated in the motion for summary judgment the Church has also filed in this action. In its motion, the Church complains about the City's rejection of a conditional use permit ("CUP")

1 application filed by the Church. Exhibit 41, Plaintiff and Real Party's MSJ, Plaintiff's
2 Motion No. 2, p. 8:3-8; Exhibit 40, Gary Mortara Declaration, ¶ 16 and Exhibit 1 to Gary
3 Mortara Declaration. The denial of the CUP application occurred in February 2008, four
4 months after the filing of the Church's current First Amended Complaint. The First
5 Amended Complaint, however, does not mention the filing of the CUP application, much
6 less its eventual denial (or the grounds for denial). Neither has the Church disclosed any
7 intent to amend the First Amended Complaint to include this claim. The Church
8 nevertheless argues in its motion for summary adjudication that denial of the CUP violated
9 the Equal Terms provisions of RLUIPA.

10 It may be that the Church believes that the First Amended Complaint somehow
11 impliedly extends to its claims concerning denial of the CUP application, since facts
12 pertaining to the original filing of the CUP were discussed in Court when the Church
13 unsuccessfully applied for a preliminary injunction in August 2007. This simply
14 demonstrates, however, why the motion for summary adjudication should *not* be granted as
15 to the City's anticipatory defenses. The Church has already proven that it does not intend
16 to limit its claims and arguments to those fairly presented on the face of its pleadings.²
17 While the City is certainly entitled to defend against any new claims or legal theories on
18 the ground that they are not fairly raised in the pleadings, there is no reason why the City
19 should be precluded from also asserting affirmative defenses against new or revised claims
20 and theories which the Church may contend are somehow properly before the Court, even
21 when they are not.

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27 ² Under Civil Local Rule 16-10(b)(12) this Honorable Court may set a final pretrial
28 conference and issue a final pretrial conference order that supersedes the pleadings and
calls out the issues to be tried. Federal Rules of Civil Procedure, Rule 16(e); *Higgins v.*
Harden, 644 F.2d 1348, 1353 (9th Cir. 1981).

1 The City briefly discusses the anticipatory affirmative defenses objected to by the Church,
2 and the reasons that they could become operative before or at the trial.

3 A. *Second Affirmative Defense – Lack of Standing.*

4 At the time the FAC was filed, the relationship of plaintiff ICFG and “real party in
5 interest” Foursquare Gospel Church was sufficiently unclear as to warrant inclusion of this
6 potential partial defense. Although there now appears no substantial issue as to ICFG’s
7 standing to pursue the claims actually presented in the First Amended Complaint, the issue
8 of standing could arise if the Church seeks to expand its claims to allege RLUIPA or
9 constitutional violations pertaining to other properties or City zoning regulations that have
10 not presently been applied directly to the Church.

11 B. *Third Affirmative Defense –Lack of Case or Controversy.*

12 This affirmative defense, like that of standing, would come into play only if the
13 Church raises new or additional claims, e.g. the Church claims that the City has somehow
14 denied it the right to use some additional property not referenced in the First Amended
15 Complaint, or asserts that the City has adopted regulations or engaged in some conduct
16 that has a hypothetical potential to infringe on the Church’s practice of religion, but has not
17 yet done so.

18 C. *Sixth Affirmative Defense – Ripeness.*

19 At the time the First Amended Complaint was filed, the Church had filed an
20 application for a CUP for church use of its industrially-zoned Catalina Street property, but
21 the City had not yet acted on the application. Although the CUP application was not
22 mentioned in the First Amended Complaint, the defense of ripeness was asserted in
23 anticipation of Church claims concerning the treatment of the CUP application. The
24 exhaustion defense has been rendered moot by the formal denial of the CUP application in
25 February 2008. (As noted above, the Church still has not amended its complaint to address
26 any possible claim based on the CUP denial.) Like the Third Affirmative Defense, the
27 ripeness defense would potentially come into play if the Church attempts to assert some

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1 new claim based on alleged interference with its rights at a new property or by reason of
2 some new hypothetical interference with the Church's rights.

3 D. *Seventh Affirmative Defense – Laches.*

4 This defense, along with the statute of limitations (Fourteenth Affirmative Defense)
5 was asserted by the City in anticipation that the Church might seek to augment its claims
6 be reference to City actions occurring prior to the application for rezoning which forms the
7 original basis for this action. To date, the Church has not attempted to expand its claims in
8 this manner. The defense of laches would potentially become applicable, however, if the
9 Church attempted to raise such a claim, *e.g.* that the City's actions regarding past
10 applications for expansion of the Church's current facilities at 577 Manor Boulevard
11 formed some part of an imagined pattern of discriminatory acts against the Church.

12 E. *Ninth Affirmative Defense – Waiver.*

13 Like the City's other anticipatory defenses, the defense of waiver could become
14 applicable if the Church were to assert new or additional claims based on transactions or
15 events occurring outside the facts alleged in the First Amended Complaint.

16 F. *Eleventh Affirmative Defense – Exhaustion of Administrative and State Law
17 Legal Remedies.*

18 This defense was also originally asserted in anticipation of claims pertaining to the
19 Church's application for a CUP, although such claims were not fairly raised in the First
20 Amended Complaint. The CUP was in fact denied in February 2008 and this action was
21 not timely challenged by the Church in state court, meaning that this defense is now
22 applicable to any claim asserted in this action based on denial of the CUP, if such validity
23 of the CUP denial is raised as an issue at trial. *See Miller v. County of Santa Cruz*, 39 F.3d
24 1030, 1032-1034 (9th Cir. 1994); *Briggs v. City of Rolling Hills Estates*, 40 Cal.App.4th
25 637, 644-648, 47 Cal.Rptr.2d 29 (1995).

26 G. *Fourteenth Affirmative Defense – Statute of Limitations.*

27 The Church to date has not challenged actions of the City predating its applications
28 for rezoning of the Catalina Street site, *e.g.* past permit decisions affecting its facilities at

1 577 Manor Boulevard. This defense would likely come into play were there any attempt to
 2 expand the Church's claims to alleging previous discriminatory or otherwise unlawful
 3 conduct.

4 H. *Fifteenth Affirmative Defense – Immunity.*

5 The Church's original complaint asserted claims against City officials in their
 6 individual capacities and also requested punitive damages. These claims have been
 7 abandoned on the face of the First Amended Complaint. However, the FAC continues to
 8 request unspecified "appropriate relief" pursuant to 42 U.S.C. § 2000-cc(2)(a) and "Other
 9 and further relief as the Court deems just and proper." FAC, pp. 38-39, ¶¶ 8 and 14. In the
 10 event that the Church reasserted a claim for punitive or exemplary damages, the City
 11 would be entitled to immunity on this claim. *City of Newport v. Fact Concert, Inc.*, 453
 12 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). In addition, were any claims reasserted
 13 against individual City officials, absolute and/or qualified immunity defenses would come
 14 into play.

15 V. *CONCLUSION*

16 For the reasons stated above, the Church's motion for summary adjudication on the
 17 City's affirmative defenses should be denied except as to the Eighth, Tenth and Sixteenth
 18 Affirmative Defenses. The Church has failed to show that there is no triable issue as to the
 19 City's remaining affirmative defenses, or that there is no possibility that these defenses
 20 may be validly raised at trial.

21
 22 Dated: September 10, 2008

MEYERS, NAVE, RIBACK, SILVER & WILSON

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 24 By _____/s/

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